CHOH NYEE NGAH & ANOR.

v.

SYKT. BERUNTONG SDN. BHD.

HIGH COURT MALAYA, MUAR
EUSOFF CHIN J
[CIVIL SUIT NO. 9 OF 1984]
23 APRIL 1989

TORT: *Tyre coming off lorry - Driver jumped to death - Whether it was latent defect - Whether owner of lorry liable - RIMV certificate of fitness - Whether conclusive evidence exculpating liability - Whether driver jumping from lorry is contributory negligence.*

The plaintiffs, the dependants of one Yee Sow Lin who was at the time of his death employed by the defendant. On 17 June 1983 the deceased was driving a timber (Mercedes Benz) lorry with a trailer loaded with logs. The evidence showed that when the lorry was entering a right hand bend on the road the front near side wheel of the lorry suddenly came off the wheel assembly - this accident caused the deceased's death.

A workshop executive from Cycle & Carriage gave evidence that "the cotter pin" of the wheel dropped off resulting in the "castle nut" or "nut stub axle" being dislodged which resulted in the wheel coming out. He also gave evidence of Cycle & Carriage's practice of a thorough examination of the wheel assembly system of their lorries at every 20,000 kilometers' run.

The evidence also showed that although the defendant owned a fleet of lorries, they only changed the lorry parts in the event of breakdown and not a regular mileage intervals - no evidence was given to show that the wheel assembly parts of the lorry driven by the deceased had been changed since its purchase in 1979 although the same had been put to heavy use since then to carry logs along jungle tracks and highways.

The lorry driven by the deceased was inspected by the RIMV on 19 March 1983 - the chief examiner of vehicles at RIMV Muar gave evidence that under the law, the 6 months' mandatory check was to determine whether the lorry was in a road-worthy condition - i.e checks on the body of the lorry, the amount of exhaust smoke, its brakes and steering and by a short drive. The evidence also showed that the checks were not designed to detect latent defects arising out of metal fatigue through constant heavy use of the lorry.

The deceased's body was found a short distance away from where the lorry stopped - the defendant pleaded contributory negligence and alleged that the deceased had jumped to his death.

Held:

[1] The 6 monthly test certificate issued by the RIMV is not designed to exculpate a lorry owner from any blame should his vehicle cause any injury to any person in an accident arising out of some mechanical defect of his lorry.

[2] What happened was not an inevitable accident caused by a latent defect not discoverable by the exercise of reasonable care in inspection and maintenance.

[3] The defendant was negligent and liable to the plaintiff for damages.

[4] What the deceased did was probably in the agony of the moment - this cannot be fairly treated as negligence. There was therefore no contributory negligence.

Cases referred to:
Miow Ah King v. Ram Singh [1987] CLJ (Rep) 779
Barkway v. South Wales Transport [1950] 1 All ER 392
Henderson v. Jenkins [1969] 3 All ER 756
Rowley v. Chatham [1970] RTR 462
Govinda Raju & Anor v. Laws [1966] MLJ 188

JUDGMENT

Eusoff Chin J:

The facts not in dispute are that on 17 June 1983 at about 8.15 p.m., Yee Sow Lim (deceased) who was employed by the defendant company as a timber lorry driver was alone driving Timber Lorry No. JAA 9994 with trailer loaded with logs. From the evidence, the police sketch plan and photographs produced at the trial, the lorry was entering a right hand bend in the highway at the 3rd mile Kuantan - Segamat road, when the front near side wheel of the lorry suddenly came off the wheel assembly. The deceased died in this accident. The deceased was driving a Mercedes Benz lorry.

The RIMV examiner's report (Ex. P2) dated 18 June 1983 said that the "nut stab axle" was dislodged causing the wheel to come out. PW2 was the workshop executive at the Cycle & Carriage workshop which deals with repairs and maintenance of Mercedes Benz motor cars and lorries. He also had experience in maintenance and repairs of this make of vehicles. He said the "nut stub axle" was in fact the "castle nut" which was held in place by a "cotter pin". This cotter pin could have dropped off due to defective fitting or due to wear and tear. This cotter pin should have not be reused once it had been taken out. The "castle nut" fitted to the axle held the wheel in place. When the "cotter pin" drops off for any reason, the castle nut and wheel of the lorry would come off. Overtightening of the castle nut would damage the nut threads, and overloading of the lorry could also cause stress to the wheel assembly parts which would give way.

According to PW2, the practice at *Cycle & Carriage* was to thoroughly examine every part of a lorry, especially a timber lorry at every 20,000 kilometers' run, including the examination of the wheel assembly and to change the necessary parts to avoid breakdown.

The defendant owned a fleet of timber lorries, and had its own workshop to service and maintain their lorries. The evidence does not show that the defendant's workshop carried out thorough checks and examination of its lorries at every 20,000 kilometers. This workshop would only change the lorry parts when the parts broke down. Though this workshop maintained some form of service records, there is no evidence to show that the lorry driven by the deceased had any of its wheel assembly parts changed since it was bought in 1979 to the date of the accident on 17 June 1983 although it had been put to heavy use to carry logs along jungle tracks and highways since the day it was purchased.

The defendants' mechanic PW4 said the wheel bearings could have broken causing the wheel and tyre to come off. There is, however, no evidence to say that the wheel bearings of this lorry had ever been replaced during the period of 4 years since it was purchased, notwithstanding that the lorry had been used to carry heavy timber and running on rough jungle tracks.

PW4, deceased's fellow lorry driver, said that the site clerk (not an employee of the defendant) determined the load to be put on the lorry when it went into the logging areas to be loaded with logs. There is no evidence to say if the lorry was or was not overloaded.

In *Miow Ah King v. Ram Singh* [1987] CLJ (Rep) 779 at 484 Harun J (as he then was) said:

> In the instant case, it was argued that it is not reasonable to foresee that the fan of a motor vehicle would be dislodged and become a flying object when the engine is started but that will be begging the question when the duty of care begins and ends. In my view, the onus is on the defendants to show that they have taken all reasonable care to ensure that their vehicle is safe and not a danger to others. There is no evidence whatsoever why the fan became dislodged or that one of the blades broke away to become a missile. In fact there is no clear evidence which of the two things occurred. The only reasonable inference is that the fan was in such a state of disrepair that it was a patent defect because it became dislodged or came apart when the engine was started. That surely is a clear case of negligence. According to the defendants the lorry was sent regularly every six months to the Registrar & Inspector of Motor Vehicles (RIMV) to be tested for road-worthiness but there is no evidence what sort of tests were in fact conducted. According to the first defendant during the five months immediately preceding the accident, the lorry had not been sent to the RIMV. It was said that the lorry was checked weekly by a mechanic. Unfortunately this mechanic did not give evidence as it was said he had left that employment and could not be traced. Be that as it may, at a salary of RM350 per month, he could not have been a very skilled mechanic. The lorry was five years old at the time and subject to regular and heavy use. There is no evidence that the fan had been recently changed or that it had been checked. I am satisfied that the defendants have not discharged the burden cast upon them that they have taken reasonable care to ensure that every component part of the engine of the lorry was intact and securely fitted. I accordingly find that negligence has been proved as alleged both against the first defendant (as driver) and the 2nd defendant (as owner) of the lorry.

In *Barkway v. South Wales Transport* [1950] 1 All ER 392, it was held that the cause of the accident was a defect of the tyres which might have been discovered by due diligence on the part of the defendants and the defendants were liable although it was not possible to affirm that the fracture in the tyre would have been discovered by the exercise of due diligence.

In *Henderson v. Jenkins*, [1969] 3 All ER 756, a five year old lorry was driven down a steep hill by its driver. At one point the brakes failed and the lorry collided with two other vehicles, killed a man and caused other damage. It was subsequently discovered that the pipe carrying the brake fluid was badly corroded and that the brake failure must have been caused by a large hole in the corroded part of the pipe. The instantaneous development of this hole was very uncommon and would have allowed the driver no warning of the pending brake failure. The appellant sued the driver and his employers, the respondents. In evidence it was shown that neither the vehicle manufacturers nor the Ministry of Transport recommended the removal of the pipe for inspection, although only 60 per cent of it was visible *in situ* and the remaining 40 per cent (in which part of pipe the hole had occurred) was particularly prone, by reason of its position, to corrosion. Evidence also established that the degree and speed of corrosion was largely determined by the use to which the vehicle was put (e.g., type of load carried, places visited, unusual occurrences). The respondents led no evidence on this subject, however, relying on a plea of latent defect. It was held that the respondents had to prove that, in all the circumstances which they knew or ought to have known they took all proper steps to avoid danger; they had failed to prove this and accordingly the appellant was entitled to damages.

In the case before me, the defendant company had sent this lorry to be inspected by the RIMV on 19 March 1983, and the accident occurred on 17 June 1983. According to DW3 - Yahaya bin Tahir who was the RIMV Muar, chief examiner of vehicles, under the law a lorry is required to be examined every 6 months by this departmental vehicle examiner to determine that the lorry was in roadworthy condition. He did not dismantle lorry parts for examination.

It is not a 100% examination of every part, but is a thorough check. Lorry driver PW4 himself had also witnessed how an officer of the RIMV conducted such 6 monthly tests on his lorry. He said that the officer would check the body of the lorry, the amount of exhaust smoke emitted and tested the lorry brakes and steering, by driving the lorry in the RIMV office compound to ensure the vehicle was in roadworthy condition. Yahaya B. Tahir's evidence shows that the examination of a lorry conducted by the RIMV is not designed to detect latent defects arising out of metal fatigue through constant heavy use of the lorry. I find that six monthly test certificate issued by the RIMV is not designed to exculpate a lorry owner from any blame should his vehicle cause any injury to any person in an accident arising out of some mechanical defect of his lorry.

In *Rowley v. Chatham* 1970, RTR 462, Shaw J found that on 6 March the defendant, an authorised examiner under the Motor Vehicles (Test) Regulations 1960, issued a test certificate relating to the plaintiff's husband's motor van. On 31 March the plaintiff's husband was driving the van when it steered into the path of an approaching lorry and he was killed. It was found that the upper and lower ball race cages of the steering column had broken down. There was evidence that this state of affairs had existed at the time of the test on 6 March.

It was held that:

> (1) On the evidence adduced by the defendant, the tests required by the 1960 Regulations were properly and duly applied and would not have revealed that there was a fault or defect in the steering. (2) The relationship between the examiner and the owner of the vehicle is a contractual one but the duty owed by the examiner is prescribed by the Regulations and is limited to certifying the condition of the vehicle at the date of the examination. Any representation expresses or implicit in the certificate cannot be relied upon some weeks later.

The evidence of PW4 shows that the defendant employed three senior mechanics and two skilled mechanics. A lorry of the defendant, when not in use would be brought to the workshop, normally on Sundays to be checked by a mechanic who would replace parts as and when the need arose. It shows that parts were replaced after they broke down. It does not show that parts are replaced at regular mileage intervals to prevent them from braking down whilst in use, such as was done by the Cycle & Carriage workshop.

I do not agree that this was an inevitable accident caused by the latent defect not discoverable by the exercise of reasonable care in inspection and maintenance, I hold the defendant negligent and liable to plaintiff for damages.

The defendant pleaded contributory negligence on the part of the deceased. It was alleged that the deceased had jumped out of the lorry before the lorry came to a stop; and that had he remained in the driver's cabin he might not have suffered injuries or died. The deceased was driving at night, at about 8.15 p.m. At the most he could only see what was being illuminated by his lorry lights. He was driving a lorry carrying logs placed behind the driver's cabin. It can safely be inferred that with a front wheel off, certainly he could not steer the lorry. If the lorry had hit the hill on the side of the road and the lorry came to a sudden stop, the chances of the logs sliding on his back and crushing him to death were very great. He had to take his chances to save his life. There was no evidence that he jumped out of the lorry. The strong inference is that he did so since his body was found a short distance away from where the lorry had come to a stop. The fact is that the deceased cannot be blamed for doing what he did, or did not do, in the agony of the moment - *Govinda Raju & Anor. v. Laws*, 1966 MLJ, 188 where it was held that what was done or omitted to be done by the plaintiff in the agony of the moment cannot be fairly treated as negligence and therefore there was contributory negligence on the part of the plaintiff.

As regards quantum of damages, the funeral expenses had been agreed to at RM2,000.

On the evidence I find that the deceased was earning an average of RM800 per month. He took meals in the house whenever he was not in the jungle loading logs on his lorry, when he had to sleep there overnight. His wife's (PW3's) evidence shows that he needed about RM300 to RM400 per month for his own expenses. He used to give his wife for household expenses between RM400 to RM500 per month. PW4, deceased's fellow driver with 5 children used to give his wife for household expenses between RM300 to RM700 per month. I would assess that deceased's contribution to his wife and family per month be RM450.

Pretrial loss of dependency between date of death of deceased to date of trial is 65 months x RM450 = RM29,250.

Deceased was 42 years old when he died on 17 June 1983. I would give 5 years multiplier (55-47 x 2/3) and on the annuity table this gives RM23,380 as future loss of dependency.

Interests at 4% p.a. from the date of accident to date of trial on the funeral expenses of RM2,000 and on pretrial loss of dependency of RM29,250.

Cost to the plaintiff.

Also found at [1989] 2 CLJ 407